Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-115

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS, INC.,
Respondents.

BRIEF OF WESTERN UNION INTERNATIONAL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALVIN K. HELLERSTEIN
Attorney for Respondent
Western Union International, Inc.
61 Broadway
New York, New York 10006
(212) 425-5200

Of Counsel:
ALAN KOLOD
STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006
and
ROBERT E. CONN
Western Union International, Inc.
One WUI Plaza
New York, New York 10004
(212) 363-6404

TABLE OF CONTENTS

	PAGE
Question Presented for Review	2
Statutes Involved	2
Statement of the Case	2
1. History of Section 222	2
2. Prior Proceedings in the FCC	6
3. Decision of the Court Below	7
POINT I—WUTelCo's Effort to Obtain Judicial Repeal of Section 222 is Inappropriate in Light of the History of Continuing Congressional Review and Oversight of Section 222	9
POINT II—The Decision of the Court of Appeals Will Not Affect the Present Structure of the Telegraph Industry or Have Any Other Significant Effect	13
Conclusion	15

CASES CITED

American Satellite Corp., 43 F.C.C. 2d 348 (1973)	14
AT&T v. *F.C.C.*, 487 F.2d 865 (2d Cir. 1973)	14
Canada Packers, Ltd. v. *Atchison, Topeka and Santa Fe Railway Co.*, 385 U.S. 182 (1966)	10
Commercial Cable Co., 28 F.C.C. 283 (1960)	5, 7
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)	14

PAGE

International Record Carriers' Communications, 38 F.C.C. 2d 543 (1972) 5

MCI Telecommunications Corp. v. *F.C.C.*, —— F.2d —— (D.C. Cir. Slip Op. 75-1635, July 28, 1977) .. 14

Power Reactor Devel. Co. v. *International Union of Electrical Radio and Machine Workers, AFL-CIO*, 367 U.S. 396 (1961) 10

Telegraph Service with Hawaii, 28 F.C.C. 599, *aff'd on reconsideration*, 29 F.C.C. 714 (1960) ..7, 10, 11, 14

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 14

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 14

Western Union Divestment, 30 F.C.C. 323 (1961) 6, 7

Western Union Telegraph Co., 25 F.C.C. 35 (1958), *aff'd in part sub nom. Western Union Telegraph Co.* v. *United States*, 267 F.2d 715 (2d Cir. 1959) 5, 6

Western Union Telegraph Co. v. *United States*, 217 F.2d 579 (2d Cir. 1954) 7

STATUTES CITED

Communications Act of 1934:

Section 214 14

Section 222 .....*passim*

Section 314 2

47 U.S.C. §§ 151 et seq. 1

47 U.S.C. § 222 ..... 2, 4

47 U.S.C. § 314 2

PAGE

Satillite Communications Act of 1962 .....11, 13

47 U.S.C. § 701 et seq. 11

MISCELLANEOUS

135 CONG. REC. S. 13859 (1977) 9

FCC's 1939-40 REPORT ON THE TELEGRAPH INDUSTRY: HEARINGS ON S. RES. 95 BEFORE A SUBCOMM. OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE, 77th Cong., 1st Sess. 394-481 (1941) 3, 8

HEARINGS ON S. 4231 BEFORE THE SENATE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 86th Cong., 1st Sess. 11, 32 (1959) 11

HEARINGS ON S. 258 BEFORE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE JUDICIARY COMMITTEE, 87th Cong., 2d Sess. 455-56 (1962) 11

HEARINGS ON S. 3646 BEFORE THE SENATE COMMERCE COMMITTEE, 87th Cong., 2d Sess. 14 (1962) 12

HEARINGS ON S. 2598 BEFORE A SUBCOMMITTEE OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 77th Cong. 2d Session at pp. 25 and 178 (1942) 4

SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, OPTIONS PAPERS, COMM. PRINT No. 95-13, 95th Cong., 1st Sess. 476 (1977) 10

RECOMMENDATIONS OF THREE PROPOSED AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934, H.R. Doc. No. 83, 74th Cong., 1st Sess. (1935) 2

S. Res. 95, 76th Cong., 1st Sess. (1939) 3

S. Res. 268, 76th Cong., 2d Sess. (1940) 3

PAGE

S. Rep. 95-389, 95th Cong., 1st Sess. (1977) 9

S. Rep. 19, 80th Cong., 1st Sess. 7-8 (1947) 10

S. Rep. No. 1982, 87th Cong., 2d Sess. 1 (1962) 12, 13

S. 353, 88th Cong., 1st Sess. (1963) 13

INDEX TO APPENDIX

Appendix A—Senate Report A-1

Appendix B—Decision of FCC Common Carrier Bureau B-1

Appendix C—Relevant Statutes C-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-115

THE WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS, INC.,

Respondents.

BRIEF OF WESTERN UNION INTERNATIONAL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of respondent Western Union International, Inc. ("WUI") in opposition to the petition of The Western Union Telegraph Company ("WUTelCo") for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered October 20, 1976 (Anderson, Mulligan, and Mansfield, Circuit Judges). That decision held that Section 222 of the Communications Act of 1934 prohibits WUTelCo from offering mailgram telegraph service between the United States mainland and the State of Hawaii.*

* All references to statutory sections are to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

Question Presented for Review

May the Federal Communications Commission ("FCC") create an exception to Section 222, which makes WUTelCo ineligible to engage in international telegraph operations, in order to permit WUTelCo to offer certain limited international telegraph services?

Statutes Involved

Sections 222 and 314 of the Communications Act, as amended, 47 U.S.C. §§ 222, 314, as set forth in Appendix C, *infra*.

Statement of the Case

1. History of Section 222

It had become clear by the late 1930's that economic conditions would not permit the two then operating domestic telegraph companies, WUTelCo and The Postal Telegraph Company ("Postal Telegraph"), to continue to co-exist. Congress, the FCC and the affected domestic and international telegraph companies all agreed that the creation of a single domestic telegraph carrier was the only workable remedy. Section 222 was enacted in 1943 to create an exemption from the applicable antitrust laws, particularly Section 314, that would permit, initially, the merger of WUTelCo and Postal Telegraph and, ultimately, the consolidation of all domestic telegraph operations into one company.*

---

* The Congressional and FCC investigations of the telegraph industry that led to the enactment of Section 222 began with an FCC preliminary report to Congress in 1935. *Recommendations of Three Proposed Amendments to the Communications Act of 1934, H.R. Doc. No. 83,* 74th Cong., 1st Sess. (1935). *S. Res. 95,* 76th

(footnote continued on following page)

WUTelCo thus was enabled, free from antitrust limitations, to merge with Postal Telegraph and was given the continuing right to acquire the domestic telegraph operations of other carriers, such as, the teletypewriter exchange service ("TWX") and the domestic private line network of American Telephone and Telegraph Company ("A.T.&T."), and the domestic radio telegraph operations of the international telegraph carriers RCA and Mackay Radio & Telegraph Co. (now a part of ITT). Section 222(b)(1), (2).

Congress, however, recognized that the existence of the several international telegraph carriers ("IRCs") would be threatened by the creation of a unified domestic carrier, because of its power, through its control over the originating and terminating portions of international traffic, to discriminate among the IRCs and to prefer its own international operations over those of other international carriers.* To deal with this problem Section 222

(footnote continued from preceding page)

Cong., 1st Sess. (1939), continued by *S. Res. 268,* 76th Cong., 2d Sess. (1940), authorized the FCC to supplement its 1935 report, resulting in the FCC's 1939-40 *Report on the Telegraph Industry: Hearings on S. Res. 95 Before a Subcomm. of the Senate Committee on Interstate Commerce,* 77th Cong., 1st Sess. 394-481 (1941), and the various subsequent Congressional hearings and reports discussed *infra*.

* Under Section 222(a)(5) the transmission of international messages between points of origin or destination within the United States mainland and points of entry into or exit from the mainland are domestic operations reserved to WUTelCo. As a result WUTelCo, not the IRCs, has all actual contacts with the United States sender or recipient of an international message, except in certain specified "gateway" cities.

Foreseeing the dangers of this situation prior to adoption of Section 222, FCC Chairman James L. Fly and FCC Commissioner Clifford Durr warned that the domestic monopoly would have "the power of life and death" over the IRCs "because much, perhaps most, of the international business originates on the domestic lines." *Hearings on S.2598 Before a Subcommitte of the*

(footnote continued on following page)

further provided, if the domestic telegraph carriers merged, (i) that the resulting monopoly carrier must divest itself of all international operations (Section 222(c)(2)), and (ii) that the domestic company must distribute outgoing international traffic among the IRCs equitably, according to a formula approved by the FCC, Section 222(e)(1).*

Postal Telegraph was merged into WUTelCo promptly following enactment of Section 222. As contemplated and authorized by Section 222(b)(1), WUTelCo also acquired AT&T's TWX system in 1971, thus obtaining a "virtual

(footnote continued from preceding page)

House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess. at pp. 25 and 178 (1942).

Similarly, Commissioner Durr testified that "there is no substantial disagreement anywhere—that the domestic combination should go out of the international business" in order to eliminate "the factor of self-interest which might influence the domestic monopoly to prefer its own international department over its competitors in the international field." *Id.* at 180.

Congress agreed. For example, the 1941 Senate Report stated:

> "In view of the fact that this Company [WUTelCo] also is a major overseas cable operator, under such an eventuality its control over pick-up and delivery facilities within the United States would seriously impair the operation of the competing international carriers." *S. Rep. No. 769,* 77th Cong., 1st Sess. 20 (1941).

Senator Ernest W. McFarland, one of Section 222's sponsors, in introducing the final version of the bill, stated:

> "Paragraph (2) of this subsection [(c)] provided for the divestment by the merged carrier of any international operations which it was carrying on, so that the merged carrier would not be put in a position to compete unfairly with other international carriers by giving preference to its own international lines." *89 Cong. Rec. 1092* (1943).

* Until divestment, WUTelCo's Cables Division, which conducted WUTelco's international telegraph operations, was to be treated as a separate "international telegraph carrier" under the Act. 47 U.S.C. § 222(e)(4).

monopoly" over domestic teletypewriter exchange (telex and TWX) as well as public message telegraph services. *International Record Carriers Communications,* 38 F.C.C. 2d 543, 546 (1972); *Commercial Cable Co.,* 28 F.C.C. 283 (1960).

Slow to heed the absolute command of Section 222, WUTelCo did not divest its international operations until 1963, twenty years after the enactment of Section 222. This delay was

> "due to the laches of [WUTelCo] and its apparent disposition to raise obstacles to compliance with Section 222 and the Commission's orders thereunder . . ." *Western Union Telegraph Co.,* 25 F.C.C. 35 at 86 (1958); *aff'd in part sub nom. Western Union Telegraph Co.* v. *United States,* 267 F.2d 715 (2d Cir. 1959).*

Pursuant to a plan of divestment approved by the FCC, a new entity, WUI, was formed and, in September 1963, it acquired WUTelCo's entire international telegraph business. WUTelCo sought to retain a non-controlling, non-voting stock interest in WUI, but the FCC held that such an arrangement was prohibited by Section 222, which because it embodied "the Congressional desire to divorce

* In that case the FCC, presenting a 13-page catalogue of the competitive abuses of WUTelCo during the 15 years it operated both international and domestic circuits, confirmed the Congressional finding that WUTelCo's abuses could not be checked by FCC regulation. 25 F.C.C. at 58-71 and 78.

> "We think that it is manifest, from our extensive findings in this connection, that continued operation of the cables by Western Union [WUTelCo] gives rise to serious problems in the distribution of international telegraph traffic, and that such problems cannot be alleviated other than by divestment. Thus, the reasons that impelled Congress to require divestment of Western Union's [international] telegraph operations have been amply justified by experience under a combined landline-cable operation." 25 F.C.C. at 78.

completely Western Union's vital landline monopoly, following merger, from all financial interest in international telegraph operations." *Western Union Divestment,* 30 F.C.C. 323, 340 (1961), quoting *Western Union Telegraph Co.* v. *United States, supra,* 267 F.2d 715 at 723 (2d Cir. 1959). As a result, WUI and WUTelCo are separate, entirely independent companies.

2. Prior Proceedings in the FCC

On April 4, 1972, WUTelCo sought to re-enter the field of international telegraph operations for the first time since 1963 by filing an application under Section 214(a) for authority to lease international facilities to provide mailgram telegraph service between the mainland United States and Hawaii, which is defined as an "international" point by Section 222(a)(10). The Common Carrier Bureau of the FCC promptly rejected WUTelCo's application (App. B).

More than three years later, ignoring its own prior decisions and without conducting any hearings at which evidence or argument could be presented, the FCC reversed its own Common Carrier Bureau and ruled that mailgram telegraph service was a "new" service not provided by WUTelCo in 1943, the year of enactment of Section 222, and that, therefore, the otherwise absolute ban of Section 222 on international telegraph operations of WUTelCo was not applicable. (WUTelCo Brief, App. D-28).

In a concurring opinion, Commissioner Charlotte T. Reid, stated that it would have been better to follow the more conservative route of asking Congress to amend Section 222. She noted that the FCC intended to ask Congress to amend the Section.* (WUTelCo Brief, App. D-37).

---

* Congress is presently considering such amendatory legislation. *See* Point I, *infra.*

3. Decision of the Court Below

The Court of Appeals vacated and set aside the FCC order. Reviewing the extensive legislative history of Section 222 and the prior judicial and administrative decisions interpreting the Section, the court held that Section 222 prohibits WUTelCo from engaging in any international telegraph operations, whether the service to be provided existed in 1943 or was developed subsequently.

The court found that Congress in Section 222 divested the FCC of any authority or discretion to permit WUTelCo to engage in any international telegraph operations whatever. The court further found that the FCC itself consistently had held this view of Section 222 until its decision in the instant case.* The court found no merit in WUTelCo's argument that Section 222 was not intended to have any effect at all on WUTelCo's reentry into any aspect of international telegraph operations after divestment.** The court also found no legislative history to support, and much to contradict, the argument of the FCC that Section 222 was concerned only with the public message telegraph service extant in 1943 and that Congress

---

* *Western Union Divestment,* 30 F.C.C. 323 (1961); *Telegraph Service with Hawaii,* 28 F.C.C. 599, *aff'd on reconsideration,* 29 F.C.C. 714 (1960); *Commercial Cable Co.,* 28 F.C.C. 283 (1960). It should be noted that *Telegraph Service with Hawaii* answers the precise Question Presented posed by WUTelCo's brief:

> "Under these circumstances, it [Congress] in effect withdrew our power under section 214 to authorize overseas service by Western Union as part of its domestic operations even if we believe such service to be required by the public convenience and necessity." 29 F.C.C. at 715.

** In *Western Union Telegraph Co.* v. *United States,* 217 F.2d 579 (21 Cir. 1954), a case dealing with the scope of the distribution formula created pursuant to Section 222(e), the court described as "ridiculous" the idea that Section 222 "contemplated strict surveillance of contemporary competition without also intending to limit the dangers of 'Western Union Cables' expansion in the future." 217 F.2d at 582.

had not intended Section 222 to cope with future technological and competitive developments.**

Although the FCC itself would have permitted WUTelCo to engage only in certain "new" international telegraph operations, the dissent argued that Section 222 was intended to deal only with the competitive situation in 1943 and, therefore, imposed no ban whatsoever on WUTelCo's reentry into international telegraphy. (WUTelCo Brief, App. A-17). Judge Mansfield did not take into account the facts that divestment occurred in 1963, twenty years after the occurrence of the "immediate anti-competitive consequences" that he felt Section 222 was exclusively concerned with and that the FCC had required WUTelCo to divest both pre- and post-1943 international operations. (WUTelCo Brief, App. A-17).

The petitions for rehearing of WUTelCo and the FCC were denied on April 22, 1977.

** The FCC's attempt to limit the scope of Section 222 to the technology and services and the competitive situation existing in 1943 is contradicted by the legislative history. FCC Chairman Fly testified in 1941 that the TWX system and leased channel services of AT&T accounted for 16.5% of the entire domestic telegraph industry, a share "second only to that of Western Union [WUTelCo]," and that any legislation which failed to consider the development of such services would contain "the seeds of its own destruction." Hearings pursuant to *S. Res. 95, supra* at 5, 19 (1941). He warned that if Congress enacted a limited statute that did not take into account the probability of future changes and developments in the industry, "we are likely to be back here in another decade." *Id.* at 234. Indeed, Section 222 on its face specifically provides for the ongoing restructuring of the telegraph industry by permitting WUTelCo to acquire telex, TWX, private line service and any other new telegraph operations of a competitor.

POINT I

WUTelCo's Effort to Obtain Judicial Repeal of Section 222 is Inappropriate in Light of the History of Continuing Congressional Review and Oversight of Section 222.

Following the decision of the Court of Appeals, the Senate passed a bill, S.1866, to make WUTelCo eligible to apply to the FCC for authority to provide mailgram and all other telegraph services to Hawaii.* (A-15). This bill, was recommended by the Senate Committee on Commerce, Science and Transportation with the intent of modifying the effect of the decision of the Court of Appeals.** *S.Rep. 95-389,* 95th Cong. (1st Sess.) (1977), included as Appendix A, *infra.* The Report acknowledged that Section 222 presently prevents the FCC from authorizing WUTelCo to provide mailgram service to Hawaii. (A7).***

This is the sixth time since 1945 that Congress has had occasion to reexamine the effect of Section 222 and to reconsider partial or total repeal of that bar against WUTelCo's engaging in international telegraph operations. The long history of Congressional concern with Section 222, the repeated willingness of Congressional committees to

---

* The Senate passed S.1866 on August 5, 1977, 135 CONG. REC. S.13859 (1977).

** Enactment of S.1866 into law would permit WUTelCo to reapply to the FCC for permission to supply mailgram service to Hawaii. Because the present case arises solely from WUTelCo's application to provide mailgram service to Hawaii, enactment of S.1866 by Congress would render WUTelCo's petition academic.

*** The FCC drafted S.1866 in consultation with WUTelco and the IRCs. There has been no opposition to the bill expressed in Congress except by WUTelCo.

study the need for amendment to Section 222* and the FCC's position that only Congress can authorize WUTelCo to engage generally in international operations** strongly suggest that WUTelCo's present effort to achieve judicial repeal of Section 222 is inappropriate. The combined action of Congress and the FCC on each of these six occasions demonstrates a sensitivity to the complicated economic and technological problems arising from the creation of the domestic monopoly and a flexibility in dealing with them that the judicial branch of government cannot provide.

On five prior occasions WUTelCo sought Congressional repeal of the divestment provision of Section 222, making clear by its testimony that unless Section 222 were repealed, WUTelCo would not be able to offer any international telegraph services after divestment occurred. Congress refused on each occasion to modify the divestment provision. Certainly no more persuasive example of Congressional ratification could be offered. *See, e.g., Canada Packers, Ltd.* v. *Atchison, Topeka and Santa Fe Railway Co.*, 385 U.S. 182, 184 (1966); *Power Reactor Devel. Co.* v. *International Union of Electrical Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 413-14 (1961).

In 1947 and 1959, WUTelCo convinced Congressional committees that its divestment obligation was unduly burdensome, but Congress refused to follow the committee recommendations to repeal or modify the divestment provision. *S.Rep. 19*, 80th Cong., 1st Sess. 7-8 (1947); *Hearings*

---

* The Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce is presently studying the question whether Section 222 should be repealed SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, OPTIONS PAPERS, COMM. PRINT NO. 95-13, 95TH CONG., 1ST SESS. 476 (1977).

** *Telegraph Service with Hawaii, supra*, 28 F.C.C. 599, *aff'd on reconsideration*, 29 F.C.C. 714 (1960); (WUTelco Brief, App. D-28).

on S.4231 Before the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 11, 32 (1959).

In 1960, the FCC asked Congress to amend Section 222 to make clear that Hawaii remained an international point under Section 222 despite its admission to Statehood.* Congress approved that amendment despite WUTelCo's objections, thereby confirming its intention to prohibit WUTelCo from engaging in any international telegraph operations.

In 1962, WUTelCo again asked Congress to amend Section 222 to permit WUTelCo to enter into international telegraph operations using a proposed international communications satellite. *Hearings on S.258 Before a Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 87th Cong., 2d Sess. 455-56 (1962). The FCC opposed that request, and Congress refused to repeal the divestment requirement, though it enacted comprehensive legislation dealing with satellite communications, the Satellite Communications Act of 1962 (47 U.S.C. §§ 701 *et seq.*).

FCC Commissioner Robert E. Lee, testifying against repeal, reminded Congress of its 1943 finding that divestment was necessary to prevent WUTelCo from "discriminating in favor of its own [international] operation."

> "[T]he congressional committees concerned, the industry, and the Commission were consistently unanimous in their view that a divestment requirement should be an essential part of any bill authorizing a merger of domestic telegraph carriers. This position

---

* The FCC announced its intention to seek such amendment in *Telegraph Service with Hawaii, supra*, 28 F.C.C. 599 (1960), in which the FCC reiterated the need for divestment and held that it lacked the power to authorize WUTelCo to provide such post-1943 services as telex.

was based on the undeniable premise that so long as the domestic telegraph monopoly was a major factor in the international field, it would be difficult if not impossible to prevent it from discriminating in favor of its own operations." *Hearings on S.3646 Before the Senate Commerce Committee,* 87th Cong., 2d Sess. 14 (1962).

During hearings on the bill, Samuel Barr, Vice-President of WUTelCo, acknowledged that Section 222 confined WUTelCo to domestic operations:

> "Senator Lausche: 'Now then, this law that was passed in the 40's declared that your business in the long run shall be confined to domestic service and not international. Is that correct?'
>
> Mr. Barr responding: 'That is correct,'" *Hearings on S.3646, supra* at 8.

Mr. Barr candidly testified that it had been "the thinking of the Congress . . . that Western Union [WUTelCo] should get out of the international field." *Hearings on S.3646, supra* at 9-10.

The Senate Interstate Commerce Committee Report expressly recognized that unless the divestment provision were repealed, the FCC would lack authority to permit WUTelCo to use satellites for purposes of international communication. As the Report stated,

> "If this divestment provision is not eliminated Western Union [WUTelCo] will be prohibited from operating in the international communications field and limited to domestic communications operations." *S. Rep. No. 1982,* 87th Cong., 2d Sess. 1 (1962).

The Committee Report recommended that WUTelCo be permitted to compete internationally in "the sale of broad-

band services, which can be used for transmitting voice, record data, facsimile, or any other type of digital communications.'"* *Id.* at 5. These hearings ultimately resulted in passage of the Satellite Communications Act of 1962. Yet, notwithstanding the efforts of WUTelCo and the recommendations of the Senate subcommittee, this comprehensive legislation preserved Section 222 without change.

In 1963, WUTelCo made a fifth unsuccessful effort to achieve repeal. *S.353,* 88th Cong., 1st Sess. (1963). Finally, on September 30, 1963, it divested itself of *all* of its international telegraph operations, including those developed in the interim between 1943 and 1963.

POINT II

The Decision of the Court of Appeals Will Not Affect the Present Structure of the Telegraph Industry or Have Any Other Significant Effect.

The decision of the Court of Appeals will not have any effect upon the structure of the communications industry, as it has evolved under a consistent line of judicial and FCC interpretations of Section 222. That decision will not limit competition among the five IRCs nor will it require the FCC to restrict competition in the domestic telegraph industry.

The Court of Appeals specifically considered and rejected WUTelCo's argument that exclusion of the IRCs from the domestic market is a necessary counterpart of the court's interpretation of Section 222 (WUTelCo Brief, App. A-10).

---

* These types of satellite communications, of course, had not been carried on by WUTelco in 1943, but no one considered that fact to be of any significance. Yet under WUTelco's newly urged reading of Section 222, WUTelco could have been permitted to engage in such international operations despite the command of Section 222.

Section 222 was not intended to protect WUTelCo from competition by the IRCs or by any other communications company, and it does not guaranty WUTelCo a monopoly or give to it the right to prohibit competition in domestic telegraph services.*

WUTelCo's argument that the decision of the Court of Appeals is erroneous, because it is inconsistent with the general principle granting broad discretion to administrative agencies, lacks foundation in the present case. *See United States* v. *South Western Cables Co.*, 392 U.S. 157 (1963); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The Court of Appeals held, as the FCC itself has,** that Section 222 withdrew from the FCC authority under Section 214 to authorize WUTelCo to engage in international telegraph operations. Congress, of course, may restrict the otherwise broad discretion of an administrative agency, as it has done in Section 222. *See MCI Telecommunications Corp.* v. *FCC*, —— F.2d —— (D.C. Cir. slip op. 75-1635, July 28, 1977) at p. 21; *AT&T* v. *FCC*, 487 F.2d 865 at 880 (2d Cir. 1973). As this court itself has said:

> "The rule making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to carry into effect the will of Congress as expressed by the statute'." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

---

* *American Satellite Corp.*, 43 F.C.C. 348, 353-54 (1973). Section 222 *permits* WUTelCo to acquire competing domestic telegraph operations, when the FCC finds that to be in the public interest. Section 222(b)(1).

** *Telegraph Service with Hawaii*, 28 F.C.C. 599, *aff'd on reconsideration*, 29 F.C.C. 714 at 715 (1960).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

ALVIN K. HELLERSTEIN
Attorney for Respondent
Western Union International, Inc.
61 Broadway
New York, New York 10006
(212) 425-5200

August 19, 1977

Of Counsel:

ALAN KOLOD
STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006
and
ROBERT E. CONN
Western Union International, Inc.
One WUI Plaza
New York, New York 10004
(212) 363-6404

APPENDIX A

Senate Report.

Calendar No. 357

95TH CONGRESS *1st Session*	SENATE	REPORT No. 95-389

AMENDING SECTION 222 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED

AUGUST 3 (legislative day, JULY 19), 1977.—
Ordered to be printed

Mr. INOUYE, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1866]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1866) to amend section 222 of the Communications Act of 1934, as amended, in order to include Hawaii in the same category as other States for the purposes of such section, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

PURPOSE

Section 222 was enacted in 1943, in the light of special circumstances then prevailing and 16 years before Hawaii was admitted to the Union. It is now 18 years since Hawaii became a State. Experience in these years has shown that the designation of Hawaii as an international

point for the purposes of section 222 has frustrated the efforts of the Federal Communications Commission and private industry to afford Hawaii similar treatment as her sister States. This disparity has resulted generally in higher rates for interstate communications to and from Hawaii, and in fewer services and facilities. Exclusion of Hawaii from the definition of "Continental United States" restricts the classes of carriers which are allowed to provide services to Hawaii. S. 1866 seeks to make available to Hawaii the same modern telecommunications facilities, services and rate-making principles which are now or will be enjoyed throughout the Continental United States. The amendment will accomplish this by including Hawaii within the definition of "Continental United States," thereby removing artificial constraints on the availability of telecommunications offerings, the entry of new carriers into the Hawaiian market and service integration into the mainland structure.

Brief Description

S. 1866 is intended to remove the anomalous designation of the State of Hawaii as an international point under section 222 of the Communications Act of 1934. The bill would amend section 222(a)(10) by including Hawaii within the definition of "Continental United States." The bill would remove the applicability of the international/domestic dichotomy to the Hawaiian market and would foster competition among all carriers serving that market. The bill would further amend section 222 by adding a new subsection, which would provide that carriers currently serving the Hawaiian market may continue to do so. Additionally, the bill would provide for the entry of additional carriers and the offering of new or additional services to the Hawaiian market, subject to the approval of the Federal Communications Commission.

Background and Need

Enactment of section 222

Prior to World War II, the two major companies providing domestic telegraph services on the U.S. mainland were The Western Union Telegraph Company and the Postal Telegraph and Cable Corporation. By 1943, both domestic telegraph companies were in serious financial trouble. Telephone services were making significant inroads into the telegraph market, leaving both telegraph companies with excessive and duplicative facilities. To solve this problem, Congress enacted section 222 of the Communications Act which created a statutory antitrust exemption to allow Western Union and Postal to merge. Congress was concerned, however, that the merged entity might utilize its new-found monopoly position in domestic telegraph service to favor its own international operation at the expense of its international record service competitors. To remove this danger, the merger legislation incorporated four additional provisions.

1. Western Union was required to divest itself of its international operations.

2. Domestic and international areas of service were defined and international record carriers (IRCs) could receive messages destined for international delivery, and hand over incoming messages destined for the hinterlands for delivery by Western Union.

3. Congress included a provision in section 222 requiring that Western Union distribute unrouted international telegraph among the overseas carriers according to "a just, reasonable and equitable formula".

4. In order to compensate Western Union for the use of its facilities for the delivery of international messages, section 222 provides that the parties negotiate a proper division of revenues. If an agreement cannot be negotiated,

the Commission is authorized to prescribe the division of revenues.

Hawaii designated as an international point

Congress drew the international/domestic dichotomy of section 222 largely on historical and geographic bases. Hawaii was not included in the definition of the domestic service area in 1943, and thus became an international location with respect to communication services. That designation was continued by congressional enactment of section 36 of the Hawaii Omnibus Act (Public Law 86-624, approved July 12, 1960) which added the phrase "except Hawaii" to section 222(a)(10). The legislative history indicates that the designation of Hawaii as an international point indicated that further study of the status of Hawaii was necessary:

> . . . to preserve, at least for the immediate future, Hawaii's exclusion from the definition (of the United States). As will appear below further consideration by the Federal Communications Commission may at a later date indicate that other or different amendments are desirable.
>
> Hawaii has historically been regarded as outside the United States for the purposes of the transmission of telegraph messages. . . . This exclusion was apparently based on geographical considerations, rather than on political status. . . .
>
> The amendment to section 222 is necessary now to maintain the status quo. . . . It may later develop, however, that different amendments may prove more suitable. The Federal Communications Commission has instituted an inquiry. . . . the purpose of which is to enable the Commission to receive from interested parties their views as to what changes in the Communications Act, if any, the Commission should recommend to Congress. Before making a determination as to what changes it recommends, other than the foregoing which would merely preserve current arrangements, the Federal Communications Commission will require more time to complete its inquiry.

The Commission did not recommend a change. In its 1960 decisions, *Telegraph Service With Hawaii,* 28 F.C.C. 599 and 29 F.C.C. 714, the Commission found that a change in status at that time promised no benefits for Hawaii.

Whatever validity the exclusion of Hawaii from domestic services may have had in the past, it would seem to have been lessened by the revolutionary changes which have taken place in communications technology and concurrent development of entirely new service concepts.

Domestic satellites are insensitive to distance or terrain crossed. They can be used to provide service between the contiguous States and Hawaii at far less additional cost than was the case when only submarine cable technology was available. There now are numerous services and potential rate advantages that are likely to accrue to Hawaii by a change in status.

Current industry structure

(a) *Domestic carrier.*—Today, Western Union retains its monopoly position in providing domestic telegraph service to the continental United States. In domestic record services, other than telegraph, Western Union faces competition from A.T. & T., specialized, resale, and satellite carriers who now offer a wide range of services capable of satisfying diverse customer requirements.

(b) *International record carriers.*—There are four major international record carriers: ITT, RCA, WUI and TRT. Three of these, RCA, ITT and WUI, serve Hawaii and, in combination, have direct circuits to virtually every major communications center throughout the world. TRT

has recently been authorized to expand its service area. The French Cable Company and U.S. Radio-Liberia, a subsidiary of Firestone Rubber, serve limited areas in Europe and Africa.

(c) *Other international carriers.*—The American Telephone and Telegraph Company (A.T. & T.) provides all message telephone service and all voice-only private line services from the United States mainland to international points. The Hawaiian Telephone Company (HTC) provides international and interstate, as well as intrastate, services for Hawaii. As A.T. & T.'s correspondent, it provides all those services A.T. & T. is authorized to provide between Hawaii and the mainland. The Communications Satellite Corporation (Comsat), a carrier's carrier, leases satellite circuits to end service carriers.

Technology and services

The sophistication of today's international record market results in large measure from the development of high quality transmission facitities. High capacity voice-grade submarine cables and satellite facilities have virtually replaced telegraph cables and HF radio for media used for overseas transmissions in 1943, and are today the backbone of the international record industry. The global satellite communications network, independently, makes possible new and innovative record and voice services, as well as international television relay, and reaches global points which cables cannot serve.

Voice-grade circuits in both cables and satellites are capable of transmitting alternate and simultaneous voice/data, facsimile and high-speed data and may be subdivided for telegraph and telex transmissions. Although public message telegraph service was the first and for many years the predominant international record service, by 1974, telegraph revenues represented only about 13 percent of total international record service revenues, with

telex and leased lines accounting for 55 and 25 percent of the industry's revenues, respectively. Telex is a teletypewriter exchange system directly linking a customer's office with any other party on a carrier's telex network. A leased channel, on the other hand, is a circuit dedicated to a single customer or customer group. Leased channel services may include teleprinter, data, facsimile, alternate voice/data, and simultaneous voice/data transmission.

Impact of section 222 upon Hawaiian communications

Disagreement as to the scope of section 222 has contributed greatly to the delay in securing new services, better rates, and new facilities for Hawaiian points. For example, because of section 222's designation as Hawaii as an international point, the Commission could not authorize provision of Western Union's MAILGRAM service. Additionally, integration of Hawaii into the domestic rate and service structure has been a long, difficult process due, at least in part, to section 222 complications.

The major class of service offerings not now available to Hawaii are those being offered on the mainland for the first time by new carriers in the competitive market. For example, Graphnet, Telenet, Tymnet, Southern Pacific and MCI are offering numerous specialized domestic services. These services consist of switching and private line services designed to meet the growing communications needs of mainland customers. AT&T has introduced Dataphone Digital Service—a private line service offering two-way transmission of digital signals at various synchronous speeds—also not available to Hawaii. Finally, as a result of the Federal Communications Commission decision prohibiting restrictions on the resale and shared use of most carrier offerings, additional services will soon be offered on the mainland. The resale and shared use decision does not apply to Hawaii, since Hawaii is classified as an international point. Many record services now offered by Western Union on the mainland are not currently offered

to Hawaii through the IRCs. Included in this group of services are Braille Gram, Data Gram, Data Comm, Infomaster (stored and forward message switching), and miscellaneous new ticker services. While it is not possible to identify which of these services and carriers, and any future services or carriers, may be competitively viable in the Hawaiian market, artificial statutory constraints should not hamper their availability.

A hearing was held on S. 1162, a bill to repeal section 222, in Hawaii on April 15, 1977. Although S. 1162 is broader in scope than S. 1866, the field hearing was narrowly focused on the effect of section 222 on Hawaiian telecommunications. A subsequent hearing on S. 1866 was held in Washington, D.C., on July 21, 1977. In the two days of hearings, nearly all witnesses, including representatives from the State of Hawaii, the Federal Communications Commission, the IRCs, the Office of Telecommunications Policy, and Hawaiian business and consumer groups testified in favor of extending to Hawaii telecommunications services comparable to those available in the continental United States. On August 2, 1977 the Committee on Commerce, Science and Transportation, meeting in open executive session, ordered S. 1866 reported with an amendment.

Section-by-Section Analysis

Section 1 has the effect of including Hawaii within the definition of "Continental United States." Such inclusion would remove those statutory constraints contained in section 222 which have prevented Hawaii from enjoying services available to her sister states on the mainland. Other aspects of international record communications to and from foreign points are not affected by this legislation.

In removing Hawaii from being designated as an international point, the committee does not intend, by this

legislation, to prevent existing carriers from providing services to Hawaii which they are now providing. Nor does the committee wish to prejudice these carriers' eligibility for additional authority for new or expanded services in the future. The committee's intent is to open Hawaii to new services and carriers not now available because of section 222's designation of Hawaii as an international point. The committee does not wish, by redesignating Hawaii as a domestic point, to automatically obliterate existing services or to sanction unfair or predatory competition.

Section 2 would add a new subsection (g) to section 222. New subsection (g)(1) would insure that no existing carrier can be barred from offering services it was authorized to offer on the date of enactment of S. 1866 as reported solely as the result of the enactment of this legislation. Subsection (g)(2) would authorize the Commission to protect the public interest by ensuring fair competition among currently existing and future carriers in the Hawaiian market.

The committee does not intend to prejudice the existing rights of the international record carriers currently offering competitive services to Hawaii. Nevertheless, the provisions contained in subsection (g) should not be read as permanently vesting any "rights" to the Hawaiian market in carriers currently serving Hawaii. Nor should new subsection (g)(1) be construed as preempting the FCC's authority to ultimately make the public interest determination of which carriers should serve Hawaii. Subsection (g)(1) should be construed only as assuring that the IRC's may continue to offer existing services to Hawaii and that these services and their authority to serve Hawaii should not be disrupted merely because by enactment of this legislation Hawaii has become a domestic point. The new subsection should not be read as a section 214 grant of authority in perpetuity. Rather, subsection (g)(1) merely preserves, rather than freezes, the status

quo until such time as the FCC determines that new carriers or services may be introduced into the Hawaiian market. In fact, the committee anticipates that there may be new entrants into the Hawaiian market, and these new entrants may be introduced on top of the carriers and services presently serving Hawaii or in lieu thereof; whatever is in the public interest of the United States as a whole.

The committee is aware of the current debate over whether section 222 bars the IRC's entry into the domestic market in the hinterland. The committee wishes to indicate that the rights of the IRC's in Hawaii to Mainland service under the new subsection (g)(1) should not be presumed to reflect new Congressional views on the IRC's authority to provide service directly to the hinterland. subsection (g)(1) is merely intended to assure continuity in service now being provided by the IRCs betwen Hawaii and the gateway cities. Section (g)(1) would insure that the ownership and operation of the three submarine cables between Hawaii and the mainland by the IRC's, ATT and their foreign correspondents will not be disturbed merely by virtue of enactment of this bill.

On the other hand, the committee does not wish to protect existing carriers or services from the forces of fair competition or from regulatory decisions arrived at for reasons other than those arising from Hawaii's change in status from an international to a domestic point. Nothing in this subsection should be construed as guaranteeing the continued size, market share, or even the continued existence of that service or carrier. Indeed, it is conceivable that existing services or carriers might decline or disappear under the pressure of fair competitive forces.

This entire subsection should in no way be construed as affecting the Commission's authority under any other sections of the Communications Act of 1934, as amended.

In addition to encouraging increased competition among carriers providing services to the people of Hawaii, these

amendments to section 222 would apply to Hawaii the regulatory and judicial decisions which have stimulated the introduction of new telecommunications equipment and services, expanded consumer choice and consumer rights for mainland citizens. Specifically, the committee's intent is to open up Hawaii to new services and carriers not now available to Hawaii by reasons of section 222's designation of Hawaii as an international point, as they now exist in this market. The committee does not presume that the Commission would automatically grant the entry of any specific new carrier into the Hawaiian market. The committee believes when the Commission applications for section 214 authorizations from either existing IRCs or new carriers (including Western Union) to serve the Hawaiian/mainland market, it should continue to apply its procompetitive policies and guidelines, in the public interest.

This amendment to section 222 will not automatically trigger any restructuring of the telecommunications industry or any new entry by either Western Union or the international record carriers into markets presently foreclosed to them. It will simply remove an arbitrary and inflexible statutory barrier to any Commission consideration of the proper role of domestic and international carriers in providing service to Hawaii.

The advent of communications satellites has also made practical the international carriage of broadband television signals. While television transmission service is not considered a record service, the international carriers offer this service on a rotational basis with A.T. & T. Following the inclusion of Hawaii within section 222's definition of the "Continental United States," the committee believes that the Commission should consider the feasibility allowing television transmission service to Hawaii on a competitive basis.

In amending section 222 to make Hawaii a domestic point, the Committee expects the Commission to monitor the developments in the Hawaiian market and to safe-

guard the public interest. Under subsection (g)(2), if the Commission finds that any charge, classification, regulation or practice relating to intercarrier arrangements is or will be unjust, unreasonable, discriminatory or not in the public interest, the Commission shall prescribe action to protect the public interest. In addition, when any person believes that any charge, classification, regulation or practice relating to an inter-carrier arrangement is unjust, unreasonable, discriminatory, or not in the public interest, he has the right to apply to the Commission for a hearing on the issue.

Cost Estimate

In compliance with section 403 of the Congressional Budget Act of 1974, the committee requested the Congressional Budget Office to prepare a cost estimate for S. 1866, which is included in its entirety as follows:

Congressional Budget Office,
U.S. Congress,
Washington, D.C.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1866, a bill to amend section 222 of the Communications Act of 1934 in order to include Hawaii in the same category as other States for the purposes of that section; as ordered reported by the Senate Committee on Commerce, Science, and Transportation.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill.

Sincerely,

Alice M. Rivlin, *Director.*

Regulatory Impact Statement

The committee believes that S. 1866 would not have any direct impact on the existing regulatory environment. The committee does not believe that the legislation would have any significant effect on FCC regulations or procedural requirements. While the purpose of the bill is to make it possible for the existing domestic record carrier as well as the international record carriers to serve the Hawaiian market, the committee cannot estimate at this time just which carriers will avail themselves of the opportunities afforded by the legislation. Although the committee believes that enactment of the bill would foster competition and result in more effective service in the Hawaiian market, the committee has been unable to obtain specific predictions of the economic impact on businesses or individuals affected by the legislation. The committee has no reason to believe that there will be any impact on personal privacy of businesses or individuals affected by this legislation. The committee believes that FCC paperwork requirements would not be substantially increased as a result of this legislation.

Changes in Existing Law

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is shown in roman):

Section 222 of the Communications Act of 1934, as Amended

(a) (1) * * *.

* * * * * * *

(10) The term "Continental United States" means the District of Columbia and the States of the Union [, except Hawaii].

* * * * * * *

"(g) (1) The authority of any carrier to provide any service or operate any facilities which it is authorized to provide or operate on the date of enactment of this subsection shall not be altered solely by the inclusion of Hawaii within the definition of Continental United States, nor shall such inclusion restrict or impair any carrier's eligibility after the date of enactment of this subsection for new or additional authority.

"(2) Whenever, upon a complaint or upon its own initiative, and after opportunity for a hearing, the Commission finds that any charge, classification, regulation, or practice relating to inter-carrier arrangements of any carrier serving Hawaii is or will be unjust, unreasonable, discriminatory, or not in the public interest, the Commission shall determine and prescribe what charge, classification, regulation, or practice, or such other remedy as is or will be just, reasonable, nondiscriminatory and in the public interest to be thereafter followed.".

TEXT OF S. 1866, AS REPORTED

To amend section 222 of the Communcations Act of 1934, as amended, in order to include Hawaii in the same category as other States for the purposes of such section

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 222(a)(10) of the Communications Act of 1934 (47 U.S.C. 222(a)(10)), as amended, is amended by striking out ", except Hawaii".

SEC. 2. Section 222 of the Communications Act of 1934 (47 U.S.C. 222), as amended, is further amended by adding at the end thereof the following new subsection:

"(g)(1) The authority of any carrier to provide any service or operate any facilities which it is authorized to provide or operate on the date of enactment of this subsec-

tion shall not be altered solely by the inclusion of Hawaii within the definition of continental United States, nor shall such inclusion restrict or impair any carrier's eligibility after the date of enactment of this subsection for new or additional authority.

"(2) Whenever, upon a complaint or upon its own initiative, and after opportunity for a hearing, the Commission finds that any charge, classification, regulation, or practice relating to inter-carrier arrangements of any carrier serving Hawaii is or will be unjust, unreasonable, discriminatory, or not in the public interest, the Commission shall determine and prescribe what charge, classification, regulation, or practice, or such other remedy as is or will be just, reasonable, nondiscriminatory and in the public interest to be thereafter followed.".

APPENDIX B

Decision of FCC Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

April 19, 1972

IN REPLY REFER TO:
9500

The Western Union Telegraph Company
7916 Westpark Drive
McLean, Virginia 22101

Attention: P. S. Schenk, Group Vice President
R. W. Stone, Assistant Vice President

Gentlemen:

1. I am writing with respect to your recent application, filed April 4, 1972, requesting authority pursuant to Section 214 of the Communications Act of 1934 to lease and operate facilities between the 48 contiguous United States and the State of Hawaii for the purpose of extending The Western Union Telegraph Company (WUTC) MAILGRAM service to include the provision of MAILGRAM between the Mainland and Hawaii.

2. As your application implicitly indicates, a threshold question to be determined prior to acceptance of such application for filing is whether WUTC may, as a matter of law under the provisions of Section 222 of the Communications Act of 1934, provide such service. For the reasons indicated below, it appears that such section does prohibit WUTC from engaging in such service, and we, therefore, are unable to accept such application for filing but will not return it pending disposition on any timely filed petition for reconsideration by WUTC. This action is taken pursuant to authority delegated to the Chief, Common Carrier Bureau, by 47 C.F.R. § 0.294.

3. We have carefully reviewed your arguments, set out at Pages 5-8, inclusive, of the proposed application, that Section 222 does not preclude WUTC from offering its proposed service, and they appear to be as follows:

a. That Section 222 refers to international telegraph operations *theretofore* carried on by WUTC, but does not preclude it from ever again engaging in international telegraph operations;

b. that MAILGRAM service is a *new* service, and not one "theretofore" carried on, and moreover will be provided by means of a medium—satellite—not in existence at the time Section 222 was enacted;

c. that accepted principles of statutory construction provide for a narrow construction of a "flat prohibition";

d. that it would be unreasonable to assume that Congress intended to preclude WUTC from engaging in future types of international record service, irrespective of public benefit, since the Commission would have full authority under Section 214 to disallow any such service it did not believe to be in the public interest;

e. that the proposed Second Report and Order recommended by the Bureau, and attached to the Commission's Memorandum Opinion and Order issued March 17, 1972 in Docket No. 16495 is dispositive of this issue in favor of WUTC.

4. Section 222 was added to the Act in 1943 to permit WUTC to acquire Postal Telegraph, which was in imminent financial danger of failure. As a condition to allowing this merger of domestic telegraph carriers, Section 222(c)(2) required that any party to the consolidation or merger must divest itself of "international telegraph operations theretofore carried on." Congress defined

domestic and international telegraph operations solely on the basis of geographical rather than political delineation. (See Sections 222(a)(5) and 222(a)(6).) Section 222(a)(10), which defines "continental United States", was amended in 1960[1] after the admission of Hawaii to statehood to preserve Hawaii's exclusion from the definition of continental United States. Thus communication between the Mainland and Hawaii remained classified for the purpose of Section 222 as "international operations" and specifically excluded Hawaii from inclusion under "domestic telegraph operations."[2] This amendment was necessary to maintain the *status quo;* i.e., telegraph operations between the Mainland and Hawaii are international operations and WUTC is precluded from engaging in such operations, inasmuch as without such an amendment, it could reasonably be argued that Hawaii had, with its admission to statehood, become a part of "domestic telegraph operations" for purposes of Section 222.

5. *Initially,* we note that an examination of the legislative history of the divestment requirement set out in Section 222(a)(2) leads to the conclusion that Congress did intend to preclude WUTC from engaging in future "international

---

[1] Hawaii Omnibus Act § 36, 47 U.S.C. § 222(a)(10) (1970).

[2] *See,* H. R. Rep. No. 1564, 86th Cong., 2d Sess. 3 (1960) which states: "In a few instances it has been found desirable, notwithstanding Hawaii's admission to statehood, to maintain existing arrangements in Hawaii or between Hawaii and the mainland which differ from those in or between the other states. These cases do not affect "the equal footing" doctrine, but grow out either of Hawaii's geographic location or of historical developments which cannot be ignored; . . . [P]rovision is likewise made . . . for maintenance (at least until the Federal Communications Commission reviews the matter thoroughly) of the treatment of telegraphic operations between the mainland and Hawaii as international rather than as domestic in character; . . ."

For further discussion see pages 17-18 of the above-mentioned House Report.

telegraph operations" as that term is defined in Section 222. Thus, in S. Rep. No. 13, 78th Cong., 1st Session (1943), on S. 158 (which became Section 222), it was noted, at Page 4, that, as a result of a study of the telegraph industry conducted by the Senate Committee on Interstate Commerce, it was recommended that Congress approve an amendment to the Communications Act which "should define 'domestic' and 'international' carriers . . . and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself *solely* to domestic telegraph operations if found to be in the public interest . . ," (Emphasis added.)[3]

6. In Docket No. 13188, *In the Matter of Amendment of the Communications Act of 1934, as Amended, Relating to Telegraph Service with Hawaii*[4], WUTC alleged that it planned to offer telegraph message, telex, leased line, and money order services between the Mainland and Hawaii and, therefore, requested that Section 222 be amended to permit it to serve Hawaii as part of its domestic telegraph operation.[5] Before we discuss the Commission's response to this request, it is appropriate to note an inconsistency in WUTC's advocacy in the instant application as compared with that followed in Docket No. 13188. WUTC argues that MAILGRAM is a new and innovative service which was not theretofore carried on prior to the merger

---

[3] S. 158, with one minor exception not germane to this inquiry, was identical to S. 2598 passed by the Senate in the 77th Congress, 2d Session. Senate Bill 2598 was favorably reported by the House Interstate and Foreign Commerce Committee (H. Rpt. No. 2664) but was not acted upon in the House because of lack of a quorum. The Report (No. 1490) of the Senate Interstate Commerce Committee on Senate Bill 2598 is fully applicable to Senate Bill 148 and was therefore incorporated verbatim in Senate Report No. 13 on Senate Bill 158.

[4] 28 F.C.C. 599 (1960).

[5] *Id.* at 609.

of WUTC and Postal Telegraph and that, consequently, the scope of Section 222 would not encompass or preclude this service. The same argument could have been made for the provision of telex service between the Mainland and Hawaii in 1960, as telex was a new and innovative service which was first offered commercially, on a very limited scale, in the United States in 1958; telex would thus be a service not theretofore offered prior to the merger of WUTC and Postal Telegraph. However, WUTC apparently did not think this argument had merit in 1960 when it requested that Section 222 be amended to allow them to provide telegraph services—including telex—between the Mainland and Hawaii.

7. It is obvious from the instant application, that no matter how new and innovative MAILGRAM service may be, it is basically a telegraph service, inasmuch as the essential transmission will be performed by WUTC, with delivery by the Post Office at destination. Moreover, it is obvious that MAILGRAM service will be a serious contender for a portion of the present market for message telegraph services between the Mainland and Hawaii presently offered by the international record carriers individually or jointly with Western Union. There is nothing to preclude Western Union and one or more international record carriers from entering into arrangements similar to those now in effect with respect to message traffic for the rendition of MAILGRAM service to Hawaii.

8. In its May 11, 1960 decision in Docket No. 13188, concerning telegraph service to Hawaii, the Commission stated:

> "We must conclude therefore that in Section 222 Congress intended that, as a condition to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier, must withdraw from competition

with the international telegraph carriers to overseas points, whether they be foreign points or interstate points under Section 3."[6]

9. The Commission further concluded that:

> "Since service to any of these points [i.e., Hawaii, Puerto Rico, and the Virgin Islands] is undoubtedly an international telegraph operation, we cannot order or permit Western Union to provide such service, no matter how urgent the public interest. If we find that the public interest requires that we should possess such power, the remedy is to ask Congress to amend Section 222, not for us to misinterpret it."[7]

10. Insofar as WUTC quotes from the attachment to the Commission's recent decision in Docket No. 16495, it misunderstands the thrust of the intent of the language, which is revealed by a full reading of the context from which the cited language is taken. The question there being considered was whether WUTC was precluded by Section 222 from owning an earth station in Hawaii as part of a domestic system since Section 222(a)(10) excludes Hawaii from the definition of "continental United States." WUTC failed to quote the following language, which appears in the same paragraph as the language it cites:

> "In the event we determine as a matter of policy that Hawaii should be included in a domestic system, there would seem to be no warrant for disqualifying Western Union alone from having any earth station interest there, particularly if the principal use of the earth station is for television program reception and other specialized services and Western Union is pre-

[6] 28 F.C.C. 599, 604 (1960).

[7] *Id.* at 605.

> cluded from providing telegraph service between CONUS and Hawaii."[8]

As we have noted above (Paragraph 7), the proposed MAILGRAM service is basically a telegraph service and, therefore, is covered by the last clause of the language above quoted.

11. In summary, therefore, we conclude:

a. The proposed service is an international telegraph service;

b. Section 222 is intended to preclude WUTC from providing future international telegraph services, as well as those provided in 1943, in competition with the independent international telegraph carriers; and

c. the Commission, therefore, has no authority to grant the instant application, even if it were considered in the public interest, absent an amendment of Section 222 of the Communications Act.

Sincerely yours,

Bernard Strassburg
Chief, Common Carrier Bureau

[8] Commission Memorandum Opinion and Order, FCC 72-229 at 56-57, 37 Fed. Reg. 5866, 5883 (1972). To the extent that the referenced language in the staff recommendation may lend itself to a construction that an offering of the subject service to Hawaii by Western Union is permissible under Section 222, the language in question should be amended to remove the basis for any such possible construction.

APPENDIX C

Relevant Statutes

All references are to the Communications Act of 1934, as amended.

* * * * *

Section 222, 47 U.S.C. § 222:

(a) As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico or Newfoundland and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided,* That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada,

Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

• • • • •

(10) The term "continental United States" means the District of Columbia and the States of the Union, *except Hawaii.* (emphasis added)

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic

telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) . . . (2) *Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger,* within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can. (emphasis added).

• • • • •

(e) (1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers shall fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public

interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

• • • • •

Section 314, 47 U.S.C. § 314:

After the effective date of this chapter [1934] no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this chapter shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire

messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share of any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.